

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   JEREMIAH W. (JAY) NIXON,               :

4   ATTORNEY GENERAL OF MISSOURI,       :

5                   Petitioner               :

6               v.                               :   No. 02-1238

7   MISSOURI MUNICIPAL LEAGUE,           :

8   ET AL., ;                               :

9   FEDERAL COMMUNICATIONS               :

10   COMMISSION AND UNITED STATES,       :

11                   Petitioners           :

12               v.                               :   No. 02-1386

13   MISSOURI MUNICIPAL LEAGUE,           :

14   ET AL., ;                               :

15   and                                       :

16   SOUTHWESTERN BELL TELEPHONE,       :

17   L.P., fka SOUTHWESTERN BELL       :

18   TELEPHONE COMPANY,                   :

19                   Petitioner               :

20               v.                               :   No. 02-1405

21   MISSOURI MUNICIPAL LEAGUE,           :

22   ET AL.                                   :

23   - - - - -X

24   Washington, D.C.

25   Monday, January 12, 2004

1                   The above-entitled matter came on for oral  
2   argument before the Supreme Court of the United States at  
3   11:03 a.m.

4   APPEARANCES:

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6       General, Department of Justice, Washington, D.C.; on  
7       behalf of the Federal Petitioners.

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9       Jefferson City Missouri; on behalf of Petitioner  
10      Nixon.

11   DAVID A. STRAUSS, ESQ., Chicago, Illinois; on behalf of  
12      the Respondents.

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1 P R O C E E D I N G S

2 (11:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in No. 02-1238, Nixon v. Missouri Municipal League  
5 and Missouri Municipal League against Southwestern Bell.  
6 Mr. Feldman.

7 ORAL ARGUMENT OF JAMES A. FELDMAN

8 ON BEHALF OF THE FEDERAL PETITIONERS

9 MR. FELDMAN: Mr. Chief Justice, and may it  
10 please the Court:

11 This case concerns 47 U.S.C., section 253(a)  
12 which preempts State laws that prohibit or have the effect  
13 of prohibiting the ability of any entity to provide  
14 telecommunications services.

15 Now, it's common ground that section 253(a)  
16 preempts State laws that keep private firms from the  
17 telecommunications market. The question presented is  
18 whether the law also reaches into the structure of State  
19 government and invalidating even a State statute that  
20 declines to grant the State's political subdivisions the  
21 authority to provide telecommunications.

22 In Gregory against Ashcroft, this Court held  
23 that Federal statutes should not be construed to intrude  
24 on core areas of State sovereignty unless Congress has  
25 made its intent to do so clear.

1           Now, in our tradition, political subdivisions  
2   are creatures of the State and they have the authority and  
3   only the authority that the State has granted them. Under  
4   respondents' interpretation, section 253(a) would be a  
5   sharp and unprecedented break with that tradition because  
6   it would be a grant of power by the Federal Government to  
7   political subdivisions of powers that the State, which was  
8   hitherto the sole source of their authority --

9           QUESTION: I don't think that's right. It  
10   wouldn't be a grant of power. It would be -- it would  
11   preserve power granted by the State itself.

12          MR. FELDMAN: Well, I don't -- I'm not even sure  
13   whether that's true. That actually goes into another  
14   difficulty in construing the statute the way the court of  
15   appeals did. Some States create their political  
16   subdivisions or some political subdivisions and say you  
17   have only the authority that we have given you, and it's  
18   not -- other States create political subdivisions and say  
19   you have any authority you want except --

20          QUESTION: The only -- the only thing I question  
21   is your statement that the statute itself is a grant of  
22   power to a local entity. It doesn't grant any power to  
23   anybody. The statute doesn't.

24          MR. FELDMAN: Well, I think --

25          QUESTION: It preserves power from being

1 preempted.

2 MR. FELDMAN: Well, perhaps it's a question of  
3 semantics, but --

4 QUESTION: It is.

5 MR. FELDMAN: -- but -- but the -- but the --  
6 the issue here is that in Missouri political subdivisions  
7 do not have the authority to provide telecommunications  
8 services. Under the court of appeals' ruling, the statute  
9 that -- that reaches that result is preempted, and  
10 therefore they do have that authority. In any event, that  
11 would be a sharp break with the tradition that because it  
12 would be Congress specifying what the authority of a  
13 political subdivision is even when a State has chosen not  
14 to give it that authority.

15 QUESTION: Is it your view that in all instances  
16 we must interpret this statute so that any entity -- that  
17 phrase -- does not include a local subdivision of the  
18 State?

19 MR. FELDMAN: Yes, because under the Gregory  
20 rule, if you -- if the Court were to construe the statute  
21 so that it did include political subdivisions, it would be  
22 a intrusion into State sovereignty.

23 QUESTION: It would be under the circumstances  
24 of this case. Are there other circumstances in which it  
25 would not intrude on the right of the State to allocate

1 powers between itself and the localities so that this  
2 statute -- so that this interpretation would have an  
3 effect in some other instance?

4 MR. FELDMAN: The other -- I can't imagine cases  
5 -- and I'm not aware that any have come up in the cases  
6 that have addressed the -- the question presented here --  
7 where there are some other restriction that a State has  
8 passed that has nothing to do with political subdivisions.  
9 And the question might arise whether a political  
10 subdivision could challenge that -- that provision of  
11 State law as well as a private party.

12 And -- but, however, since the Court is in the  
13 business here of construing the statute and the question  
14 is what is the meaning of the word any entity, I think  
15 under the Gregory rule, that -- that term has to exclude  
16 political subdivisions. And if it excludes it here, I  
17 think it -- there's no --

18 QUESTION: Mr. Feldman, do we need to apply the  
19 clear statement rule of Gregory v. Ashcroft for you to  
20 prevail?

21 MR. FELDMAN: I think it's our understanding --  
22 it's our understanding that the rule would apply here. I  
23 guess the rule applies for the reasons I've already given,  
24 which is this is an intrusion on State sovereignty. If  
25 that were not the case, the question would be whether a

1 general term like the term, any entity, is whether that  
2 would just naturally be construed to extend so far or  
3 whether it wouldn't.

4 QUESTION: Exactly.

5 MR. FELDMAN: And I would say that it raises the  
6 question that I was -- the -- the problem that I was  
7 referring to before in responding to Justice Stevens,  
8 which is State -- the application of 253(a) would depend  
9 on the form in which a State chooses to give or not give  
10 its power to its political subdivisions. If it was a  
11 State -- a home rule State where the cities have all the  
12 powers except what's expressly denied them, then a State  
13 that tried to pull back the power to provide  
14 telecommunications -- that would be preempted. In another  
15 State --

16 QUESTION: Are those home rule States  
17 established in that fashion by the State constitutions?

18 MR. FELDMAN: I think so sometimes.

19 QUESTION: In which case the language of section  
20 253(a) which says no State or local statute or regulation  
21 or other State or local legal requirement may prohibit or  
22 have the effect of prohibiting. I'm not sure that -- that  
23 would reach a constitutional question.

24 MR. FELDMAN: It would at least be a difficult  
25 question to try to figure out whether there is still



1 something that prohibits or has the effect of prohibiting  
2 rather than something which just never granted the  
3 authority before. You could consider a political  
4 subdivision of a State that's a special purpose water  
5 district or fire prevention district that just doesn't  
6 have the authority, was never intended to have the  
7 authority, and nothing in State law suggests that it  
8 should have the authority to provide telecommunications.  
9 It would be hard to find something that should be  
10 preempted in that case.

11 QUESTION: Suppose you didn't give that very  
12 broad meaning to any entity, but you included State  
13 entities that had been in the business and were otherwise  
14 authorized by State law to go into this business and then  
15 the State changes its law and without having a section (b)  
16 requirement, because you have loads of power under section  
17 (b), so we assume the entity meets section (b)'s test, but  
18 it passes another law which says, by the way, the  
19 municipality can't go into it. And previously they had.  
20 So -- so we're not -- we're -- we're talking about only  
21 entities that have proved themselves fit, willing, and  
22 able to offer the -- the -- to offer the business.

23 MR. FELDMAN: I -- I don't --

24 QUESTION: Now, why -- why would that not be  
25 included?

1           MR. FELDMAN: I -- I don't think it -- because I  
2 -- I think that there is -- it's very difficult to imagine  
3 that Congress intended that the -- the scope of this  
4 statute should turn on the exact historical steps --

5           QUESTION: No, no.

6           MR. FELDMAN: -- that they once had or --

7           QUESTION: But what we want -- we want -- we  
8 have implicitly there and it would be necessary in the  
9 State case but not in the private entity case an entity  
10 that is fit, willing, and able. And -- and an entity that  
11 is fit, willing, and able can include a municipality. So  
12 what this statute is after is the State passing a new law  
13 changing the status of an entity that was previously fit,  
14 willing, and able.

15          MR. FELDMAN: But I guess what I was responding  
16 to was it's not -- the -- the definition of what a  
17 political subdivision is fit, willing, and able to do is  
18 something that -- it is a creature of State law. It's  
19 defined by State law, by the State laws that have --

20          QUESTION: That -- that's correct, but it's  
21 defined by State regulatory law in respect to those  
22 entities at least that have previously offered the  
23 business.

24          MR. FELDMAN: I think there's actually very few  
25 -- before 1996, I think there were very few -- and I'm not

1     aware of examples. There may be a few in the amicus  
2     briefs. There are very, very few entities in this country  
3     of these political subdivisions that offered  
4     telecommunications services. This is a question that has  
5     only arisen --

6             QUESTION: You see, in other words, but your  
7     argument here is coming down to the difficulty of trying  
8     to draw the distinction I'm suggesting.

9             MR. FELDMAN: I think that -- I think part of my  
10    argument is the difficulty of drawing that distinction,  
11    but the most important part of it is that this is an  
12    intrusion into a State's understanding of its government  
13    and what it wants to do with its authority. And where a  
14    State --

15            QUESTION: If the -- if the statute were clear,  
16    if it said public -- it said any entity, public or private  
17    -- but you're -- you're making an argument now that seems  
18    to say no matter how clear this was, there would still be  
19    a vulnerability.

20            MR. FELDMAN: No. I don't -- I don't think so.  
21    I think there would be interpretive problems that would  
22    arise in the statute if it had said -- specified any  
23    public -- any governmental entity or something like that  
24    that really would have clearly referred to States and  
25    political subdivisions.

1 QUESTION: Well, wouldn't -- wouldn't any --

2 MR. FELDMAN: That would have been --

3 QUESTION: -- any entity, public or private,  
4 wouldn't that do?

5 MR. FELDMAN: I think it's likely that that  
6 would do. The problem here is that any entity is just the  
7 kind of general term without the -- the reference to  
8 public or private or without specific references to State  
9 governments and political subdivisions. It's just the  
10 kind of general term that this Court referred to in Raygor  
11 and said that where there's a clear statement rule, that  
12 kind of general term is not sufficient to overcome it.  
13 And here, there's nothing in the statute that suggests  
14 that Congress thought about, considered, and intended to  
15 put into question the issue of State sovereignty that  
16 would be -- that -- the intrusion on State sovereignty  
17 that would be raised by construing 253(a) the way the  
18 court of appeals did.

19 Beyond the statute itself, in the legislative  
20 history there's -- there is a -- the committee report  
21 repeatedly refers to the private sector deployment of  
22 advanced telecommunications as what the bill is designed  
23 to achieve. Not only that, the floor debates -- they're  
24 cited in, I think, Southwestern Bell's reply brief -- show  
25 also people consistently referring to the private sector

1 development of advanced telecommunications.

2 QUESTION: May I ask you --

3 QUESTION: Isn't it also the case --

4 QUESTION: May I ask you this one more sort of  
5 general question? As I understand your theory, you read  
6 the statute as an anti-monopoly statute. No State shall  
7 grant any exclusive privilege. Isn't that -- you say  
8 that's really what it does. And my question is if that  
9 were the purpose, why wouldn't they write it that way that  
10 no State shall grant a monopoly or grant exclusive  
11 privilege?

12 MR. FELDMAN: It actually is broader than that.  
13 There is another provision which says -- I don't remember  
14 the number -- which says that there can't be exclusive  
15 franchises. This is intended to get at laws not only that  
16 would by terms give an exclusive franchise or keep a  
17 particular company out of the telecommunications business,  
18 but also that would have the effect of doing that by  
19 imposing high taxes on one category of -- of participants  
20 rather than on another category. There -- there's the --  
21 in fact, in the Texas case that came before this, the  
22 Federal Communications Commission found a couple of  
23 provisions of Texas law preempted because they did just  
24 that.

25 And the statute was designed -- it is an anti-

1 monopoly law, but it is a little bit broader than just  
2 granting exclusive franchises. It's also favoring one --  
3 at one -- one company or one class of company or the  
4 incumbent telephone company over other new entrants into  
5 the field.

6 Respondents cite the -- Lead-Deadwood case as  
7 the closest that they can come to this, and I'd just like  
8 to point out that that case has a dramatically different  
9 question than the one here. In that case, there was no  
10 question of the Federal Government giving authority to  
11 local -- to political subdivisions that the State itself  
12 had not -- had not given. That case would be much closer  
13 to this case if, for example, the State there had said we  
14 don't want our political subdivisions to be providing  
15 education because we do that at the State level, and then  
16 the political subdivision had taken the Federal money that  
17 was at issue there and said we want to open up a local  
18 university or something. At least that would have  
19 presented the question that's presented here of an  
20 intrusion of that sort on State sovereignty, but that  
21 wasn't before the Court there and therefore the Court  
22 didn't apply a clear statement rule.

23 QUESTION: What is the United States' position  
24 about utilities, public utilities, electric companies?

25 MR. FELDMAN: I'm not sure what you mean. If

1     you mean by public utilities companies that are in the  
2     business --

3             QUESTION: To enter this business.

4             MR. FELDMAN: Yes, they certainly can.  
5     Privately owned companies that are in the utility  
6     business --

7             QUESTION: Suppose it -- suppose it's mixed  
8     ownership, city and private.

9             MR. FELDMAN: The Federal Communications  
10    Commission's position is if, under State law, it's treated  
11    as a private entity, the fact that stock, some or even all  
12    of the stock, is owned by the political subdivision  
13    wouldn't be -- it would still be an entity. It would be  
14    -- if it's treated under State law as a private company.

15            In this case, the FCC looked at Missouri law and  
16    determined, I think, correctly -- it hasn't been  
17    challenged here -- that this is simply a law that prevents  
18    political subdivisions as political subdivisions from  
19    providing telecommunications services, and therefore,  
20    since it's really operating on the political subdivision  
21    itself and not on some other corporation, it's not  
22    preempted.

23            I'd like to reserve the balance of my time.

24            QUESTION: Very well, Mr. Feldman.

25            Mr. Molteni, we'll hear from you.

1 ORAL ARGUMENT OF RONALD MOLTENI

2 ON BEHALF OF PETITIONER NIXON

3 MR. MOLTENI: Mr. Chief Justice, may it please  
4 the Court:

5 The Eighth Circuit interprets entity to include  
6 political subdivisions of the States, and that would mean  
7 that Congress has -- it would have the effect of Congress  
8 giving Missouri's political subdivisions authority that  
9 the -- the very State that created them has withheld. And  
10 that would intrude drastically on the structure of State  
11 government.

12 A general language term like entity is too broad  
13 to meet the Gregory test because it doesn't clearly and  
14 unmistakably include State subdivisions. If -- if the  
15 general term entity, without a contextual compass, as it  
16 appears in 253(a), satisfies the clear and unmistakable  
17 test, then clear and unmistakable really has little  
18 meaning.

19 But that standard is important to the States  
20 because it gives the States some notice and opportunity to  
21 react to proposed legislation that may intrude on State  
22 sovereignty, and it requires Congress to be clear in the  
23 wording that it uses and to demonstrate cognizance of the  
24 impact of legislation on State sovereignty.

25 QUESTION: Why isn't any entity clear? I mean,



1     what --

2                   MR. MOLTENI:   Justice Scalia --

3                   QUESTION:   What do they have to say to make any  
4     -- any entity clear?   Paren, and we really mean it?

5                   (Laughter.)

6                   QUESTION:   Or it has to say any entity  
7     whatsoever?   Would that be clear?

8                   MR. MOLTENI:   Justice Scalia, there are no magic  
9     words, and we're not asserting that there are magic words  
10    that need to be there.   There has to be some terminology  
11    within the statute that -- that demonstrates that Congress  
12    was cognizant it intended to intrude on State government.  
13    There are other instances -- and I think Southwestern  
14    Bell's brief does a nice job pointing out that entity is  
15    used 600-and-some times in various statutes.   It's used  
16    multiple times even in the Telecommunications Act,  
17    oftentimes with a modifier, sometimes without, and  
18    oftentimes with a definition, and sometimes the definition  
19    is one -- it includes just a business context, and  
20    sometimes the definition is one that includes government  
21    and public and State, private, political --

22                   QUESTION:   But it's perfectly clear that this  
23    statute does intrude substantially on the -- on the  
24    State's ability to regulate.   Just even if it just does  
25    what you say, it's a significant impairment of the State's

1 ability to run its own affairs.

2 MR. MOLTENI: It's a -- Justice Stevens, it's a  
3 significant restriction on the State's ability to -- to  
4 impact commerce.

5 QUESTION: To regulate private companies.

6 MR. MOLTENI: But this Court has held in the  
7 Gregory v. Ashcroft case that Congress has to use more  
8 than the general language. It has to be clear and  
9 unmistakable.

10 And, Justice Stevens, in -- in the -- the  
11 Leadwood case that -- that Mr. Feldman brought up, your --  
12 the dissent that -- that you wrote affirms some of the  
13 principles that -- that we've cited in our brief regarding  
14 Hunter and -- and the City of Trenton case that the States  
15 control the -- the creations that they have, that they've  
16 made, all their political subdivisions, and -- and that is  
17 -- is something that this Court has always honored.

18 QUESTION: You're saying that it's one thing for  
19 the Federal Government to supersede State regulation  
20 substantively, but another thing to say -- to tell the  
21 State not only do we do that, but we're going to change  
22 the relationship you have with your local subdivisions.

23 MR. MOLTENI: That's exactly right, Mr. Chief  
24 Justice. That's exactly right.

25 QUESTION: Suppose they -- they did -- is it

1       totally Ashcroft you're relying on? Gregory v. Ashcroft?

2               The -- suppose you looked at the statute as  
3       saying it doesn't prohibit States from enacting all kinds  
4       of laws that have the effect of prohibiting people to  
5       enter the business. Tax laws, for example, might leave  
6       them without money to do it. It's only talking about  
7       specific laws aimed at saying you can't enter. And if  
8       it's aimed at specific laws saying you can't enter this  
9       business, then couldn't you say where a State's entity  
10      otherwise would have the authority to enter, then the  
11      State cannot pass a law that says in those circumstances  
12      you cannot enter telecommunications such as municipality  
13      as well as private company?

14              Now, what's wrong with that interpretation?  
15      What I'm doing is I'm trying to deal with what I thought  
16      of myself and they confirm is the major objection that  
17      this can't be administered once we start down the path I'm  
18      just starting down.

19              MR. MOLTENI: Justice Breyer, I think it would  
20      create an anomalous situation where if a State's political  
21      subdivisions had been providing telecommunications prior  
22      to 1996, they would be treated differently under the --  
23      under 253(a).

24              QUESTION: No, no. It would be -- the question  
25      would be whether they had the authority to do it. If they

1 had the authority to do it, then the State -- what it  
2 could not do is it could not pass a law which aims at  
3 primarily -- aims at primarily their authority to enter  
4 telecommunications. They could do all kinds of other  
5 things including removing authority as long as it were  
6 general, and then there would be middle cases where the  
7 authority, you see, is --

8 MR. MOLTENI: But I -- I still think, Justice  
9 Breyer, that what that does is it make -- it divides the  
10 States into two categories and makes the Federal statute  
11 treat the States in two different ways so that if a State  
12 had granted authority prior to 1996, the -- they -- they  
13 may never -- that State is never allowed to change its  
14 mind about --

15 QUESTION: It's a one-way ratchet.

16 MR. MOLTENI: -- about the scope of authority  
17 that it grants its own political subdivisions.

18 QUESTION: I -- I suppose it would also allow  
19 States to adopt a -- a system of chartering corporations  
20 which charters the corporations according to various  
21 categories, mining, manufacturing, and it just does not  
22 happen to name the category of telecommunications. And  
23 that would not be touched by -- by this type of an  
24 interpretation enabling the State to create a monopoly --  
25 well, to -- to exclude any -- any telecommunication

1 company.

2 MR. MOLTENI: Justice Scalia, I believe that I  
3 agree with you, although I think the more and more we talk  
4 about what States authorize and don't authorize their  
5 political subdivisions do -- to do, the more and more that  
6 becomes really the -- a State issue and -- and really what  
7 I -- what I would call an intramural issue that would --  
8 that would be a matter litigated between the States and  
9 their political subdivisions at the State court level.  
10 And what -- what I really think this case is about is an  
11 application of 253(a) that, because of the general  
12 language that -- that Congress used, won't be presumed and  
13 cannot meet the clear and unmistakable standard in Gregory  
14 to -- to allow or at least have the effect of -- of  
15 Congress' intruding into the structure of State  
16 government.

17 QUESTION: So suppose that a State says that no  
18 political subdivision in this State shall have the  
19 telecommunications facility that does interactive  
20 television unless the carrier that it contracts with pays  
21 the city a fee of \$1 million. Could the State do that?

22 MR. MOLTENI: I believe --

23 QUESTION: And you'd say -- in other words, it's  
24 conditioning the ability of its subdivisions to engage in  
25 this by demanding that it extract certain financial

1 consideration, and suppose that this is prohibitive.

2 MR. MOLTENI: If -- if the State were addressing  
3 that in terms -- through the private sector, I don't think  
4 there would be -- I'm not sure I understand exactly where  
5 your question is going, Justice Kennedy. But the -- could  
6 -- the State can't create barriers to entry to private  
7 sector competitors.

8 QUESTION: Well, suppose -- suppose --

9 MR. MOLTENI: That's clearly preempted by the  
10 Commerce Clause and -- and it's prevented specifically by  
11 253(a).

12 And I think what -- what that derives from, if  
13 one looks at the purpose of the Federal Telecommunications  
14 Act of 1996 and you look at the -- the history of what was  
15 going on, huge swatches of the country were provided  
16 service by regional Bell operating companies and they were  
17 granted the exclusive franchise in -- in areas. And the  
18 whole purpose of the '96 act was to accelerate private  
19 sector deployment and -- and to -- to take these -- these  
20 swatches of territory that regional Bell operating  
21 companies maintained monopolies on and encourage private  
22 sector deployment and people would come in and utilize  
23 either those -- the -- the facilities that -- that were  
24 provided -- that -- that exist that the regional Bell  
25 operating companies had or unbundle network elements or to

1 -- to resell and -- and hopefully even the encouragement  
2 of -- of building their own facilities base.

3 But that's all -- that all ends up being a red  
4 herring discussion in terms of the clear language of  
5 253(a) because 253(a) uses those general terms.

6 Now, the FCC's reading of entity won't bar  
7 States from entering commercial phone business through  
8 their -- through their political subdivisions because the  
9 FCC's reading allows that States who want to go into the  
10 phone business -- they'll be able to do that. But States  
11 like Missouri that want their political subdivisions  
12 focused on core missions will be able to make that choice  
13 if this Court allows the FCC's reading.

14 QUESTION: Do we know how many States allow  
15 their municipalities to enter this business?

16 MR. MOLTENI: How many States allow their own --

17 QUESTION: Yes. In other words, you're arguing  
18 for a position it's up to the State. They can let the  
19 municipalities enter or not if they choose. So in -- in  
20 fact, what has happened across the country?

21 MR. MOLTENI: Justice Ginsburg, I -- I do not  
22 know that. I have not surveyed which States allow their  
23 political subdivisions to -- to enter the commercial phone  
24 business and -- and which, like Missouri, have made that  
25 choice to have -- made the choice to have their -- their

1 political subdivisions focus on their core missions.

2 Another problem that's created with the  
3 respondents' reading of -- of entity is that it literally  
4 means the State cannot regulate itself, and that -- that  
5 creates an anomaly and -- and it doesn't make a lot of  
6 linguistic sense or a lot of public policy sense.

7 The clear and unmistakable standard requires  
8 more of Congress than this use of general language and  
9 where there is doubt, States are entitled to the benefit  
10 of that doubt.

11 If the Court has no further questions, Missouri  
12 would respectfully request that the Court reverse the  
13 Eighth Circuit and preserve the ability of the State of  
14 Missouri to determine the functions of its own political  
15 subdivisions.

16 QUESTION: Thank you, Mr. Molteni.

17 Mr. Strauss, we'll hear from you.

18 ORAL ARGUMENT OF DAVID A. STRAUSS

19 ON BEHALF OF THE RESPONDENTS

20 MR. STRAUSS: Thank you, Mr. Chief Justice, and  
21 may it please the Court:

22 Our position in this case is straightforward and  
23 I can state it very simply. Gregory against Ashcroft  
24 applies in circumstances where the statutory language is  
25 ambiguous. The Court has said that three times, including



1 in Gregory itself. And the language of 253(a), any  
2 entity, is not ambiguous. It's not -- it's not as if  
3 Congress had said, for example, any corporation, which  
4 might leave some doubt whether Congress meant only private  
5 corporations and not municipal corporations.

6 QUESTION: But it doesn't mean any fish, for  
7 example. I mean, there are a lot of things it doesn't  
8 mean.

9 MR. STRAUSS: I -- I wouldn't -- I wouldn't -- I  
10 guess it doesn't mean any fish, Justice Breyer, but of the  
11 -- I think it has a very broad meaning. I think it means  
12 any entity and --

13 QUESTION: When you -- when you say the statute  
14 has to be ambiguous, the Gregory rule as put forth in the  
15 opinion is that there has to be a clear statement covering  
16 the Federal -- Federal aspect of the thing. And it seems  
17 to me that that cuts away from the idea it has to be  
18 ambiguous.

19 MR. STRAUSS: What the Court -- the Court said  
20 in Gregory that the statute has to be ambiguous and it  
21 reiterated that in Salinas and more recently in Yeskey.

22 QUESTION: It depends on what you mean by -- by  
23 ambiguous. What -- what -- the -- the language in Gregory  
24 was -- was employees, wasn't it?

25 MR. STRAUSS: Well, the unambiguous language in

1 Gregory was employee. The ambiguous language was at the  
2 policymaking level. In Gregory itself -- it's a -- it's  
3 an important point, Justice Scalia. In Gregory itself,  
4 the Court thought it was unambiguous that employee, State  
5 employee, included State judges. Now, it seems to me  
6 linguistically to say that State employee includes State  
7 judges is more of a stretch than saying any entity  
8 includes local governments, but that's what --

9 QUESTION: In your view does --

10 QUESTION: Of course, you're -- you're into  
11 State already. I mean, the -- the State versus non-State  
12 was not at issue in Gregory. It was just how far into the  
13 State you go. I mean, it -- the whole thing applied to  
14 State -- State employees, but not at the policymaking  
15 level.

16 What about Atascadero? The -- the language  
17 there was any recipient of Federal assistance.

18 MR. STRAUSS: Yes. Atascadero, Justice Scalia,  
19 I think the Court has applied a different, stronger, much  
20 stronger, form of a clear statement rule in the State  
21 sovereign immunity cases where it has required specificity  
22 in the Court's words.

23 QUESTION: I think there are various levels of  
24 -- of clear statement rules.

25 MR. STRAUSS: Well, I think the -- the best

1 illustration of that is the contrast between the Court's  
2 decision in Raygor and the Court's decision in Jinks which  
3 have the advantage of focusing on exactly the same  
4 statutory language, any claim asserted in a supplemental  
5 jurisdiction statute. In Raygor, the issue was whether  
6 that language overrode State sovereign immunity, and the  
7 Court said no. In Jinks, the question was whether that  
8 language overrode a State's decision to immunize its  
9 subdivisions, and the Court said, yes, it did. The same  
10 language.

11 Jinks is the case like this. In fact, Jinks is  
12 more of an intrusion because the Congress was taking away  
13 a power that the State wanted to confer and the locality  
14 wanted to have, and the Court just very`unanimously and  
15 with no difficulty said Congress can do that with the  
16 language, any claim asserted. Raygor was a State  
17 sovereign immunity question. The Court analyzed it  
18 differently.

19 And I think that makes the point that the kind  
20 of rigor the Court expected in cases like Atascadero does  
21 not apply in Gregory cases. In Gregory cases, if it's  
22 unambiguous, that's the end of the case.

23 QUESTION: Does the word, any entity, cover the  
24 State itself?

25 MR. STRAUSS: Yes, I think it covers the State

1     itself.

2                 QUESTION:   So if the Governor is about to sign a  
3     contract to -- to allow the State to enter into  
4     communications facilities and the legislature instructs  
5     him not to, that statute is void?

6                 MR. STRAUSS:   No, that statute is not void,  
7     Justice Kennedy.   I think that statute -- analytically  
8     that situation is exactly the same as if a board of  
9     directors of a private corporation decided not to go into  
10    the telecommunications business and the CEO defied it.  
11    And the solution is the State can say under our neutral  
12    principles of corporate governance, the CEO can't do that  
13    not because the corporation is not an entity.

14                QUESTION:   Why don't neutral principles of  
15    corporate governance apply to the relations between the  
16    State and its subdivisions?

17                MR. STRAUSS:   They --

18                QUESTION:   Suppose there's a constitutional  
19    provision.

20                MR. STRAUSS:   They absolutely do if they are  
21    truly neutral principles.   If it's a provision of State  
22    law that says, for example, subdivisions may not engage in  
23    any commercial activity and there's no argument that  
24    that's just a subterfuge to keep them out of  
25    telecommunications, it's a truly neutral provision, States

1 can absolutely enforce that.

2 QUESTION: But you say that it can't be made  
3 precise to telecommunications.

4 MR. STRAUSS: That's right.

5 QUESTION: That was my example in the State  
6 hypothetical, in the first hypothetical.

7 MR. STRAUSS: Well, the -- what's -- what's  
8 operating there is the general rule that Governors have to  
9 do what the State legislature tells them to do.

10 QUESTION: Well, here it was operating as a  
11 general rule that subdivisions have to do what the State  
12 tells them to.

13 MR. STRAUSS: Well, when this --

14 QUESTION: I don't see why the general rule  
15 applies in one instance and not the other, given your  
16 definition of entity.

17 MR. STRAUSS: Because in the -- in the case like  
18 this one, what the State has done is to enact a specific,  
19 targeted rule not competitively neutral -- that issue is,  
20 strictly speaking, not before the Court yet -- a targeted  
21 rule that keeps an entity out of the telecommunications  
22 business. And a municipality is an entity in the same way  
23 that a private firm is an entity. Congress' language was  
24 any entity. That language is simply not --

25 QUESTION: Yes, but Raygor had any entity too

1 and we said that was not conclusive there.

2 MR. STRAUSS: Raygor said any claim. That's  
3 right. That's right, Mr. Chief Justice. But Raygor was a  
4 case decided in the shadow of State sovereign immunity.  
5 The Court said a constitutional doubt was created by  
6 principles of State sovereign immunity.

7 As I -- as I said to Justice Scalia, Jinks  
8 interpreted exactly the same language, any claim, to be  
9 sufficient to allow Congress to deprive local governments  
10 of an immunity that States wanted to grant them.

11 QUESTION: Well, that was not the only  
12 difference.

13 QUESTION: No.

14 QUESTION: I mean, there were other factors in  
15 Jinks besides -- besides just the language, any claim.

16 QUESTION: And also the fact that sovereign  
17 immunity had never extended -- a State Eleventh Amendment  
18 immunity had never -- had never been extended to counties.

19 MR. STRAUSS: Well, that's of course right, Mr.  
20 Chief Justice. And in fact, that is the reason I want to  
21 take exception with the picture painted by petitioners  
22 that what -- our position would here would lead to some  
23 dramatic, unprecedented intrusion on State authority.

24 It's actually quite familiar for Federal law to  
25 interfere, quote/unquote, with the relations between State

1 and local governments. Section 1983 imposes liability on  
2 local governments.

3 QUESTION: But those are all under the  
4 Fourteenth Amendment where the Thirteenth -- Fourteenth  
5 Amendment altered the Federal balance with reference to  
6 those. That's not what's involved here.

7 MR. STRAUSS: Well, I understand that the  
8 Fourteenth Amendment has special significance for purposes  
9 of State sovereign immunity. I've never known the Court  
10 to say that the Fourteenth Amendment has special  
11 significance for purposes of Gregory against Ashcroft. I  
12 don't -- I don't think that -- that is a -- a --

13 QUESTION: If -- if for purposes of -- will you  
14 assume with me -- and I may be the only one who thinks  
15 this. But I think when you use words like any entity or  
16 the word any, that there's an implicit scope, and since I  
17 think there's an implicit scope, I'm trying to define that  
18 scope. So I don't want to -- I mean, it's not going to  
19 help me for you to say, well, it's clear because I don't  
20 think it's clear.

21 But at that point, I now want to -- to find out  
22 whether -- explore what you said that, well, if we did  
23 apply this to the States and their municipalities, all we  
24 would really be doing is targeting laws.

25 Now, I did my best to pose some questions along

1     those lines, but I was met with the answer which strikes  
2     me as a pretty good answer.  There's just no way to do  
3     what you're suggesting.  It's going to be a nightmare.  
4     Justice Scalia suggested one reason it was a nightmare.  
5     And I'd add that in the case of private companies, this  
6     statute is designed to give the private company the right  
7     to enter or the right to quit.  Once you apply it to a  
8     municipal entity, it has the right to enter, but it could  
9     never quit.  Now, that would be bizarre.

10           MR. STRAUSS:  No.

11           QUESTION:  So given the -- the sovereign  
12     immunity -- you know, the sovereign -- all -- all the  
13     things we've been talking about in general, given the  
14     difficulty of drawing a line, which seems virtually  
15     impossible or very hard, and given the one-way ratchet I  
16     just described, it can't be that Congress intended to  
17     include municipal entities within the scope of the word,  
18     any entity.  What -- what is your -- that's -- I'm trying  
19     to get to the merits.

20           MR. STRAUSS:  Yes.

21           QUESTION:  What's your response to that?

22           MR. STRAUSS:  Yes.  I don't agree that there's a  
23     one-way ratchet at all, Justice Breyer.  I think the --  
24     the purpose of 253(a) is to eliminate barriers to entry.  
25     It's not to force anyone, private or governmental, to go



1     into the telecommunications business or stay in the  
2     telecommunications business. And if a -- if a local  
3     government unit decides of its own accord to enter and  
4     then decides of its own accord to leave, it is not  
5     prohibited anything.

6             QUESTION: The State -- the State cannot tell it  
7     not to enter.

8             MR. STRAUSS: The State cannot tell it not to  
9     enter by a targeted, non-competitively neutral provision.

10            QUESTION: I don't understand. Why does it  
11     matter whether it's targeted or not? Suppose it lists  
12     counties can enter into the following commercial  
13     businesses. It lists seven or eight. It does not list  
14     telecommunications.

15            MR. STRAUSS: It -- the reason why it's targeted  
16     -- targeted is what I'm using to embrace the notion stated  
17     in 253(b) which preserves an enormous realm of regulatory  
18     authority to the States. States may enact competitively  
19     neutral regulations that satisfy certain other criteria.  
20     And that's an important part of this picture because if  
21     you had 253(a) in isolation, that would -- that would  
22     certainly be draconian. That would certainly be a -- a  
23     remarkable --

24            QUESTION: Well, what -- what's your answer to  
25     the hypothetical I give you? Is that targeted or not?

1           MR. STRAUSS: Well, I think that would be -- if  
2   it -- if it specified certain commercial activities but  
3   not others, I think that would be a difficult question.  
4   The question would be is that a gerrymander --

5           QUESTION: That's why I asked it. I mean --

6           MR. STRAUSS: Well, the question -- the question  
7   would be a 253(b) question for the FTC in the first -- FCC  
8   in the first instance.

9           QUESTION: Well, it had nothing to do with  
10   whether it's competitively neutral. It's competitively  
11   neutral. Nobody can enter except these fields. I mean --

12          MR. STRAUSS: If it -- if it were a gerrymander  
13   designed to keep -- really just designed to keep entities  
14   out of telecommunications, it would be unacceptable.

15          QUESTION: So we're going to have to get into  
16   inquiring into whether State legislatures -- well, of  
17   course -- of course, they didn't want it. It was designed  
18   to keep them out of telecommunications because it said  
19   these are the only fields you can get into.

20          MR. STRAUSS: That's -- that --

21          QUESTION: If your question is whether it was  
22   designed to keep them out of telecommunications, the  
23   answer is unquestionably yes.

24          MR. STRAUSS: This -- I agree --

25          QUESTION: But -- but if you say it's okay if

1     they not only keep them out of telecommunications, but  
2     they keep them out of a lot of other stuff as well, does  
3     that make it okay?

4             MR. STRAUSS: This is the question that would  
5     have to come up when the FCC applied 253(b) to a public or  
6     a private entity --

7             QUESTION: But why should we --

8             MR. STRAUSS: -- public or private.

9             QUESTION: Why should we interpret a statute in  
10    that awkward way, that the FCC has to make this kind of  
11    factual inquiry in every case?

12            MR. STRAUSS: I think the FCC is in that  
13    business with respect to private entities anyway. A  
14    State --

15            QUESTION: What is the -- I don't even  
16    understand what the factual inquiry is. What is it --

17            MR. STRAUSS: Well, the inquiry --

18            QUESTION: -- that the FCC would be looking for?

19            MR. STRAUSS: The inquiry -- it's 253(b). It  
20    says States may enact measures that are competitively  
21    neutral and necessary to promote certain public  
22    objectives. That's a savings clause. It's not --

23            QUESTION: So the FCC is going to decide what is  
24    necessary to promote --

25            MR. STRAUSS: That's --

1 QUESTION: -- Missouri's public objectives?

2 MR. STRAUSS: That is the business -- that is  
3 unquestionably the business Congress put the FCC in with  
4 respect to private entities. There is no disagreement  
5 about that.

6 QUESTION: I see the answer to that part, which  
7 is you're saying they have to do it anyway, and I  
8 understand that. Whether -- I'm not sure I agree, but I  
9 understand it.

10 What about the part that it's a one-way ratchet?  
11 And there I think that local governments unlike local  
12 private businesses act through regulation, at least  
13 normally. And so the statute talks about a requirement, a  
14 local requirement or a local regulation, and therefore, a  
15 State, State A, that does not permit its municipalities to  
16 go into the business, then passes a statute that does  
17 permit it, then the local council passes a regulation that  
18 says we'll do it, which is now a requirement, and when  
19 either tries to repeal either, they run right straight  
20 into your -- to this statute forbidding it as you  
21 interpret it. And now, that's why I say it's a one-way  
22 ratchet in respect to municipalities, but not a one-way  
23 ratchet in respect to private businesses.

24 MR. STRAUSS: The reason it's not a one-way  
25 ratchet, Justice Breyer, I think turns on the word

1 prohibit. This isn't -- the statute 253(a) says State and  
2 local regulations that prohibit the entry. If -- if I  
3 decide not to go skiing, I've not prohibited myself from  
4 going skiing. I've simply made a decision not to do  
5 something. If a local government decides not to enter the  
6 telecommunications business, it hasn't prohibited itself.  
7 It simply made a decision.

8 QUESTION: But the State could not repeal the  
9 statute.

10 MR. STRAUSS: The State could not repeal the  
11 statute unless it were part of a competitively neutral  
12 reorganization of local government or something like that.  
13 Then it could repeal it, but it couldn't enter a targeted  
14 repeal of it without running afoul -- it seems to me  
15 without running afoul --

16 QUESTION: Why -- why would Congress design such  
17 a strange system where -- where the municipality can get  
18 in and then get out, but the State can't allow the  
19 municipality to get in and then decide, no, we want to  
20 allow them to get out?

21 MR. STRAUSS: I --

22 QUESTION: It's just bizarre.

23 MR. STRAUSS: I think it applies -- I think for  
24 these purposes, municipal corporations and private  
25 corporations are simply on a par as, of course, they were

1     for large parts of our history. That's why municipalities  
2     don't have many immunities. And Congress, for these  
3     purposes, simply saw municipal corporations as another  
4     source -- implicitly saw -- and the words, any entity,  
5     implicit in that sense, in the -- in the ordinary meaning  
6     of those words -- saw them as another source of  
7     competition.

8                 QUESTION: Just so I understand you, a State can  
9     -- can grant certain powers to municipalities, does not  
10    have to grant them the power to enter into -- into  
11    telecommunications activity. Right?

12                MR. STRAUSS: Yes. Yes, that's right.

13                QUESTION: It does not have to grant them that  
14    power.

15                MR. STRAUSS: Well, the -- the restraint is the  
16    competitively neutral language which will ordinarily allow  
17    municipalities to say -- the States to say, look, here's  
18    what you can do and here's what you can't do --

19                QUESTION: Right.

20                MR. STRAUSS: -- provided they aren't acting in  
21    a way that is competitively non-neutral with respect to  
22    telecommunications.

23                QUESTION: Right, but -- but once they have let  
24    them get into telecommunications, it's -- it's only the  
25    municipality that can decide to get out of it.

1           MR. STRAUSS: No. The State could repeal the  
2 authority if it does it, again, in a competitively neutral  
3 way. If a State decided, for example, to abolish all  
4 units of local government or if a State decides to say,  
5 okay, we are assigning special functions to municipal  
6 governments.

7           QUESTION: Okay, but -- but the municipality  
8 itself can say we're going to get out of  
9 telecommunications.

10          MR. STRAUSS: Yes.

11          QUESTION: The State cannot say no -- no  
12 municipality shall do telecommunications.

13          MR. STRAUSS: That's right. The municipality  
14 can decide for itself because then it's not prohibiting  
15 anyone from doing anything. It's simply making a  
16 decision.

17          QUESTION: Mr. Strauss, may I go back and ask a  
18 variant on Justice Breyer's question, assuming that there  
19 is some implicit limitation on -- on the scope of any  
20 entity? And it relates to what, if I have my facts  
21 straight, is the -- is the drafting history in this case,  
22 and I'd like you to tell me whether I have got the facts  
23 straight because I didn't look them up myself. I just got  
24 this out of the briefs. And if so, what you think the  
25 significance is.

1           As I understand it, at least the Senate version  
2 of the original bill had a provision in it that  
3 affirmative -- expressly provided that any existing  
4 utility, whatever its object of service, could go into the  
5 telecommunications business. And this, as -- as you point  
6 at one point in your brief, this would be -- this would be  
7 good for your argument because a lot of those utilities  
8 are municipal utilities.

9           As I understand it, in the -- in the conference  
10 committee, that language was, in fact, removed entirely,  
11 and subsequent to its removal in the conference committee  
12 report, there were references to any private entity being  
13 able to go into the telecommunications business but not  
14 the old, pre-conference committee references to -- to any  
15 -- any public as well as private entity.

16           That suggests to me, the -- the combination of  
17 the drafting change and the conference committee report,  
18 that the implicit scope they were getting at was an  
19 implicit scope that says any entity is a reference to  
20 private, not public.

21           What -- are my facts straight, and if so, what  
22 -- what's your response to that argument?

23           MR. STRAUSS: Two point, Justice Souter. First,  
24 I think it is common ground that Congress did envision  
25 utilities as among the any entities. And the -- the



1     likely reason Congress didn't spell that out was that it  
2     was already included in the notion any entity, and  
3     Congress didn't want to begin spelling out specifics and  
4     run --

5                 QUESTION:   So you say the -- the excision was a  
6     redundancy excision.

7                 MR. STRAUSS:  Yes, that's right.  And I think  
8     there is no dispute that not only that utilities are among  
9     entities, but that Congress really saw utilities as a  
10    primary source of -- of competition.

11                QUESTION:  Okay.  The answer to that I think is  
12    in -- in part a response to something in your brief.  You  
13    mentioned that the original House and the original Senate  
14    reports were speaking, among others, expressly of -- of  
15    public entities.  As I understand it -- and again, I  
16    didn't look myself.  I just got this from -- from one of  
17    the briefs.  As I understand it, the conference committee  
18    report -- after this excision, which is arguably just a  
19    redundancy excision, the conference committee report  
20    started using the adjective private entities rather than  
21    public entities as being subject to this kind of universal  
22    preemption.  Doesn't that nix the theory that it was  
23    merely a redundancy excision?

24                MR. STRAUSS:  The conference committee report, I  
25    believe, Justice Souter, used the word private to describe

1 -- in describing the sort of competition it believed would  
2 be brought about. That passage from the conference  
3 committee report was then incorporated almost verbatim in  
4 the preamble to the statute, but the word private was left  
5 out when it was transferred to the statute so that the  
6 word private that does occur prominently in the conference  
7 committee report -- I agree with that -- dropped out of  
8 the statute, which simply talks about encouraging  
9 competition.

10 QUESTION: Okay. What we're left with, it seems  
11 to me, is -- is at least -- maybe let's call it tension  
12 between the conference committee report and the preamble  
13 language which was then inserted. And isn't that a  
14 perfect situation to provide -- to -- to apply a Gregory  
15 kind of rule, saying when we're not sure what they meant,  
16 we want them to spell it out more clearly before we  
17 conclude that they, in effect, are -- are limiting the --  
18 the power of a -- of a State to determine what its  
19 municipalities can do? Isn't this a good situation for a  
20 Gregory rule?

21 MR. STRAUSS: I think the ambiguity to which  
22 Gregory refers -- I mean, I don't think. I mean, I think  
23 it is clear the ambiguities to which Gregory refers is  
24 ambiguity in the statutory language.

25 QUESTION: I -- I think so too.

1 MR. STRAUSS: And --

2 QUESTION: And -- and maybe what I'm saying is  
3 we -- we ought to -- those of us who would look into the  
4 -- the legislative history, as I would, maybe ought to  
5 take advantage of a slightly broader Gregory rule.

6 MR. STRAUSS: Well, the -- the case I think that  
7 would stand in the way more than any other perhaps --  
8 well, many would I think, but the clearest example I can  
9 think of is Yeskey where the -- the question in Yeskey  
10 whether the ADA, the Americans with Disabilities Act,  
11 applied to inmates of State prisons. The Court assumed  
12 that prisons were special and that the Gregory rule  
13 applied to legislation that assertedly reached prisons.

14 The Court also assumed that Congress never  
15 specifically contemplated that prison inmates would be  
16 covered, and it said, nonetheless, unanimously that if the  
17 language -- the language is something like State  
18 instrumentalities -- if the language included prisons,  
19 Gregory was satisfied.

20 QUESTION: Isn't the difference, though -- and I  
21 -- I see your argument. But isn't the difference that in  
22 that case we didn't have anything in the history either of  
23 the drafting or of the legislative consideration of the  
24 statute that suggested that there really was an -- an  
25 argument each way as -- as to whether they -- they were --

1 they were intending to -- to cover the -- the prisoners.  
2 They simply didn't deal with -- with that situation at  
3 all, and they used absolute kind of -- of language.

4 Here, there is an argument to be made because  
5 the drafting changed. The drafting certainly could have  
6 significance for -- for public utilities. There is a  
7 tension between the -- the conference committee report and  
8 the preamble. In other words, we've -- we've got a -- a  
9 question sort of affirmatively raised by the history of  
10 the drafting and enactment of the statute, whereas there  
11 was simply silence in the Yeskey situation.

12 MR. STRAUSS: Justice Souter, I guess the  
13 difficulty I'd have with that approach in general would be  
14 it has to be common for there to be this sort of  
15 uncertainty in legislative history with feints in a  
16 certain direction and withdrawals for reasons that are  
17 difficult to -- to fathom.

18 QUESTION: Well, I -- I grant you that, but when  
19 -- when the -- when the issue relates to the kind of State  
20 sovereignty issue that -- that Gregory addresses, that's a  
21 good reason for having a Gregory rule.

22 MR. STRAUSS: Well, but as to the legislative  
23 history, I think that sort of uncertainty is going to be  
24 easy to generate, and what we do have here -- in addition  
25 to any entity, what we do have here, not just in the

1 legislative history, but on the face of the statute, is,  
2 as I said, agreement I think all around that utilities are  
3 prominent among the entities that Congress envisioned. I  
4 think that's completely clear.

5 QUESTION: But would you also say that the  
6 legislative history makes it pretty clear that there's a  
7 distinction in meaning between the term private entity on  
8 the one hand and the term entity on the other hand, and  
9 the statute used the term entity?

10 MR. STRAUSS: Well, that's true, Justice  
11 Stevens. Of course, they could have said private entity  
12 had they meant that. That's not -- I mean, our argument  
13 is any entity means any entity.

14 QUESTION: So what does -- what does --

15 QUESTION: Is there any argument for putting --  
16 leaving this up to the commission? That is, can it be  
17 done? Because I can see a complex interpretation that may  
18 be workable that you're suggesting and may be helpful  
19 competitively, frankly. And I also can see some good  
20 arguments against, assuming Congress intended that complex  
21 interpretation. But under those circumstances, maybe  
22 Congress purposely leaves it somewhat ambiguous permitting  
23 the commission to go one way or the other, and although  
24 you've lost it in the commission so far, maybe in the  
25 future, the commission would say, well, we think we want

1 to Chevronize this, in other words.

2 MR. STRAUSS: Well, I think -- I think that --

3 QUESTION: What do you think about that?

4 MR. STRAUSS: I think that is the scheme  
5 although not under 253(a). What the commission -- we know  
6 the commission's views with unusual clarity here. What  
7 the commission said is we think we've got to say the  
8 statute is not preempted.

9 But as far as the purposes of the -- of the act  
10 go, this is a terrible State law. All the purposes the  
11 State wants to be accomplished can be accomplished in less  
12 restrictive ways. The commission has said that over and  
13 over again as emphatically as it can.

14 And the way to Chevronize, Justice Breyer, to  
15 use your term, is by saying that these -- that  
16 municipalities are entities, but these admittedly somewhat  
17 difficult issues about what special problems do  
18 municipalities pose, those should be handled under 253(b),  
19 which is what Congress had in mind. That's -- of course,  
20 the States can enact laws so that there can be licensing  
21 requirements and basic fitness requirements and various  
22 kinds of regulation --

23 QUESTION: You say -- you say that that's -- I  
24 -- I could -- I could understand that there's no ambiguity  
25 if you simply say any entity means any entity. But -- but

1 to say that the statute -- but you're not willing to say  
2 that it says that. You're not willing to say that -- that  
3 the State cannot prohibit its -- its counties from  
4 entering into commercial activities. That would certainly  
5 have the effect, which is all this requires -- have the  
6 effect of prohibiting the ability of counties to provide  
7 interstate or intrastate -- you're not willing to say  
8 that. You -- you insist that we derive this very subtle  
9 distinction between the State initially granting it and  
10 then taking it away or the county taking it away itself.  
11 I don't think that that is unambiguously within the  
12 statute at all.

13 What's -- what the unambiguous choices are are  
14 that the States are not included or that the States are  
15 included, and that means that -- that the States cannot  
16 exclude counties or, for that matter, even departments of  
17 the State government itself from entering into the  
18 telecommunications business. That would be unambiguous.  
19 But if you're not willing to embrace that, it seems to me  
20 you are arguing that the statute is ambiguous.

21 MR. STRAUSS: As -- as to 253(a), Justice  
22 Scalia, I am absolutely embracing that. I am absolutely  
23 embracing the notion -- and maybe I disagree with Justice  
24 Breyer about this -- that any entity means any entity, and  
25 I will go down the line with that.

1           The reason that doesn't lead to absurd results  
2   like the maverick Governor entering the telecommunications  
3   business against the will of the legislature is because of  
4   253(b). Now, 253(b) is filled with ambiguities and  
5   complexities and -- and problems that the commission will  
6   have to take the first crack at.

7           QUESTION: -- impact upon (a). You -- you can't  
8   use (b) to explain (a) and then say, oh, yes, (b) is  
9   ambiguous.

10          MR. STRAUSS: I --

11          QUESTION: If you're using an ambiguous (b) to  
12   explain (a), (a) itself is ambiguous.

13          MR. STRAUSS: (b) does not explain (a). (a) has  
14   a very -- I agree with you, Justice Scalia. It has a very  
15   clear meaning. Any entity means any entity, and if -- it  
16   -- it would trivialize Gregory to say that Congress has to  
17   say, and we mean any entity whatsoever. Congress has to  
18   come up with a -- a definition. Any entity means any  
19   entity.

20          In answer to the charge that that produces  
21   absurd results, I say no. Congress left a broad scope for  
22   State regulation, broad enough not only to deal with  
23   absurdities, but broad enough so that these claims about  
24   incursions on State sovereignty are, I think, grossly  
25   overstated.



1           I mean, let me draw the comparison to Gregory  
2 directly. In Gregory, Congress passed an anti-  
3 discrimination law, an age discrimination law. The claim  
4 was that that law required States to give their judges --  
5 their judges life tenure, a major structural issue. And  
6 the Court said, well, if they had stopped at employees,  
7 maybe they would be giving judges life tenure, but they  
8 said employees at the policymaking level and that's just  
9 too ambiguous for us to think Congress was doing such a  
10 dramatic thing to the structure of State government.

11           This is nothing like that. This -- this statute  
12 simply says that among the universe of entrants that we  
13 want in this robust, wide-open, newly competitive field of  
14 telecommunications, if municipal corporations, true to  
15 their roots as corporations, want to get into this  
16 business, the States can't keep them out except if they're  
17 doing the kinds of regulation that States can reasonably  
18 do to private and public corporations alike. That seems  
19 to me not only a coherent reading of the statute, not only  
20 one that is consistent with what everyone agrees is the  
21 very dramatic pro-competitive turn that the 1996  
22 Telecommunications Act took, but also one that really is  
23 not a significant incursion on State sovereignty,  
24 certainly not an unprecedented incursion on State  
25 sovereignty. When decisions of this Court have held

1 municipalities liable under the antitrust laws,  
2 notwithstanding State efforts to immunize them, liable for  
3 damages, notwithstanding States' efforts to immunize them,  
4 have withdrawn from municipal governments States' efforts  
5 to grant them sovereign immunity against State claims in  
6 the State court, Congress --

7 QUESTION: It has nothing to do with their  
8 authorities, all of those instances you mentioned. It has  
9 nothing to do with their authority.

10 MR. STRAUSS: I'm sorry, Justice Scalia. With  
11 their?

12 QUESTION: Authority under State law.

13 MR. STRAUSS: Well, it has to in a sense -- I  
14 agree with you, Justice Scalia, it doesn't. In a sense,  
15 those are more intrusive because what we have here are  
16 local government bodies who say we want to do this in  
17 order to serve the needs of our citizens. We don't have a  
18 situation in which Congress is thwarting the will of both  
19 the States and the localities. We have a situation in  
20 which localities want to do this, in some cases  
21 desperately want to do this, believe that Congress, when  
22 it said any entity shall be free from barriers, believe  
23 that Congress gave them the power to do it, subject of  
24 course to reasonable regulation by the State, only to find  
25 that Gregory against Ashcroft, the decision that is

1 supposedly designed to ensure that decisions -- that  
2 government decisions are made at a level responsive to the  
3 people -- Gregory against Ashcroft is thrown up as an  
4 obstacle to their doing what they think is needed to serve  
5 their citizens' interests.

6 And given what seems to me to be the unambiguous  
7 language of section 253(a) and the very limited  
8 circumscribed focused nature of what Congress has done in  
9 this circumstance, it seems to me to be an unwarranted  
10 conclusion for the -- for the commission to reach.

11 If the Court has no further questions.

12 QUESTION: Thank you, Mr. Strauss.

13 MR. STRAUSS: Thank you.

14 QUESTION: Mr. Feldman, you have 2 minutes  
15 remaining.

16 REBUTTAL ARGUMENT OF JAMES A. FELDMAN

17 ON BEHALF OF THE FEDERAL PETITIONERS

18 MR. FELDMAN: I'd like to contrast this case  
19 with the Yeskey case, which came up during Mr. Strauss'  
20 argument. In the Yeskey case, the Americans with  
21 Disabilities Act referred to public entities, I think, and  
22 then it defined them as including any department of the  
23 State. Once -- that meant that in that act, Congress had  
24 specifically considered that it was going to intrude  
25 deeply, as Justice Scalia said, in State government, and

1     it had made the decisions of how to do it and the whole --  
2     in fact, title II of the act is designed to -- to tailor  
3     that, exactly how Congress wanted to.

4             In this statute, there's no indication that  
5     Congress crossed that initial dividing line and wanted --

6             QUESTION: Well, Mr. Strauss points to  
7     subsection (b) of the statute as indicating Congress did  
8     contemplate giving some leeway.

9             MR. FELDMAN: Yes, Congress did contemplate  
10    giving some leeway to the States when it was competitively  
11    neutral, but the question of what competitive neutrality  
12    means in this context is not an easy one.

13            And -- and I'd like to add that if Congress had  
14    had to take the -- do what it did in Yeskey and -- and  
15    decide yes, we do want this to apply to the States, it  
16    might have occurred to Congress that they were going to  
17    have to think about exactly what that means, applying a  
18    statute like this to State governments that grant their  
19    political subdivisions different kinds of powers in  
20    different kinds of ways. Congress didn't -- never made  
21    that first choice that it consciously wanted to intrude on  
22    State -- State sovereignty the way the Eighth Circuit  
23    held, and therefore it never answered those other  
24    questions.

25            QUESTION: What is the rationale for saying a

1     municipal utility, a wholly owned electric company, wholly  
2     owned by the city, that's okay? That doesn't matter --  
3     the State can't stop that from going into the  
4     telecommunications, but it can stop the municipal  
5     corporation.

6             MR. FELDMAN: Well, I mean, that is an issue in  
7     this case, but the FCC's rationale is that insofar as  
8     under State law you have a thing that is treated just like  
9     a private corporation, it's -- it's an entity. That's  
10    exactly who Congress was clearly and directly and most  
11    importantly targeting this law at. It's -- it's where the  
12    -- if it's a municipally owned utility that is really  
13    treated like the political subdivision of the State, as  
14    they are in Missouri, then that would be different because  
15    that would raise these other questions, and Congress had  
16    never made the decision that it wants to intrude on --  
17    really in an unprecedented way, on the authority of the  
18    political subdivisions. States decide to give --

19            CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
20    Feldman.

21            The case is submitted.

22            (Whereupon, at 11:59 a.m., the case in the  
23    above-entitled matter was submitted.)

24

25